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NOISE AND VIBRATION AS ELEMENTS OF NUISANCE.

1. *Preliminary.*—That courts of equity frequently interfere to enjoin the doing of certain things as nuisances, on account of disturbing noises or injurious vibrations produced by them, will abundantly appear from the following pages. It is not proposed to discuss the principles upon which such courts proceed in administering this relief; the limits of a short article do not admit of this. But as this is a very unusual subject of such relief, the interest centres in the circumstances under which it has been accorded or withheld in various cases, and in what the judges have said concerning the application of the rules under which courts of equity proceed in abating nuisances, to those particular circumstances. This it will be the purpose of this article to show.

2. *Noise alone may constitute a nuisance.*—Since the decision of *Elliotson v. Feetham*, 2 Bing. N. C. 134, it has not been doubted, so far as the writer knows, that noise alone may constitute an actionable nuisance, such as may form the basis of a recovery of damages at law, or such as a court of equity will restrain by an injunction: *Soltau v. De Held*, 2 Sim. N. S. 133; *Crump v. Lambert*, L. R., 3 Eq. 409; *Fish v. Dodge*, 4 Denio 311; *Harrison v. St. Mark's Church*, 12 Phila. 259; *Wallace v. Auer*, 10 Id. 356; *Inchbald v. Robinson*, L. R., 4 Ch. App. 388. "There is," said Lord ROMILLY, "I apprehend, no distinction

between any of the cases, whether it be smoke, smell, noise, vapor or water, or any other gas or fluid. An owner of one tenement cannot cause or permit to pass over or flow into his neighbor's tenement any one or more of these things, in such a way as materially to interfere with the ordinary comfort of the occupier of the neighboring tenement, or so as to injure his property:" *Crump v. Lambert*, L. R., 3 Eq. 409, 413. So, it is said in a case in New Jersey, "There may be circumstances where even the noise of a steam engine may become a private nuisance, and its use, on that account, be restrained by the court. The authorities are abundant to sustain the position that an individual cannot erect, in a densely settled portion of a city or town, occupied by private dwellings, any kind of manufacturing establishment, and so use the machinery and carry on the business as to render living in the neighborhood uncomfortable, either on account of the noise it occasions, or of its smoke and offensive smells: *Davidson v. Isham*, 9 N. J. Eq. (1 Stock.) 186, 190. In like manner it was laid down by the Supreme Court of Pennsylvania that the courts have power to restrain by injunction noises which disturb rest and prevent sleep: *Rhodes v. Dunbar*, 57 Penn. St. 274. To the same effect see *Ross v. Butler*, 19 N. J. Eq. 294. "Noise which constitutes an annoyance to a person of ordinary sensibility to sound, such as materially to interfere with the ordinary comfort of life and impair the reasonable enjoyment of his habitation, is a nuisance to him;" *Davis v. Sawyer*, 133 Mass. 289, opinion by ALLEN, J. See also *Wesson v. Washburn Iron Co.*, 13 Allen 95; *Fay v. Whitman*, 100 Mass. 76.

Sect. 3. *Noises, when indictable as a public nuisance.*—It may be premised that, to render an act indictable as a nuisance, it is not sufficient that it should annoy particular persons only, but it must be so inconvenient and troublesome as to annoy the whole community: *State v. Baldwin*, 1 Dev. & Batt. 197; *State v. Hughes*, 72 N. C. 25. Beating a drum is not a nuisance; to blow a fife is not; neither is a procession through the street with these accompaniments a crime. To constitute them such, the exceptional facts and circumstances which make acts, otherwise innocent, a crime, must be set forth particularly, so that the court can see that from their very nature, if proved, they are a nuisance to the whole community:" *State v. Hughes, supra*. Accordingly where there was an indictment containing three counts, the first for a riot, the second for a common nuisance by the beating of drums, the blowing of

fifes and shouting in the streets of the town, and the third for obstructing the streets, and it appeared that the defendants, who were persons of color, were celebrating emancipation day, and that there was no further irregularity than usually accompanies any promiscuous mass-meeting and parade, it was held, on a special verdict, that the defendants must be discharged: *Id.*

4. *Whether nuisance must be established by a verdict at law.*—Courts of equity are reluctant in these cases to enjoin an otherwise lawful trade which produces disturbing noises, until the parties complaining have established that it is a nuisance by a judgment at law. Thus, where a bill was brought to enjoin a glass factory, on the ground that the carrying of it on produced noises which disturbed the plaintiff and several other persons in the neighborhood, Vice-Chancellor KINDERSLEY refused relief on this ground, but the view which he took of it seems to be untenable. It is to be gathered from what he is reported to have said, that he did not place his refusal on the ground that the thing complained of was no nuisance in point of law, but on the ground that it was remediable in an action at law for damages. Among other things he said, "In a case where the only questions are mere inconvenience to the parties by the alleged noise, disturbing more or less their sleep, or in reference to the diminution of the value of the plaintiff's property—in either case the injury is not irremediable, but is capable of compensation in damages:" *White v. Cohen*, 1 Drury 296. A learned judge in Pennsylvania took the opposite and only tenable view of this question, when he said: "I cannot doubt that a constant annoyance, which at law can never be abated, is never remedied by damages. The loss of health and sleep, the enjoyment of quiet and repose, and the comforts of home cannot be restored or compensated in money. It may afford consolation, but it does not remedy the evil, if that goes on, to be paid for by instalments. The law operates upon the *past* only, while equity can and will act on the present and future, will abate the nuisance itself and restore the injured party to his rights: *Dennis v. Eckhardt*, 3 Grant's Cas. 390. This was a case where there was no substantial conflict in the evidence. It is said that where the thing sought to be enjoined is lawful, and there is a conflict of testimony as to whether it is a nuisance, the question of fact must be determined at law before equity will enjoin: *Davidson v. Isham*, 9 N. J. Eq. (1 Stock.) 186.

5. *Noises which render dwelling-houses uncomfortable.*—The grounds on which courts of equity interfere to restrain occupations or things which produce such noises as to render people uncomfortable in their adjacent dwelling-houses, have been thus stated by an eminent judge: “If there were no authority on the question I should have felt no difficulty about it, because I take it the law is this, that a man is entitled to the comfortable enjoyment of his dwelling-house. If his neighbor makes such a noise as to interfere with the ordinary use and enjoyment of his dwelling-house, so as to cause serious annoyance and disturbance, the occupier of the dwelling-house is entitled to be protected from it. It is no answer to say that the defendant is only making a reasonable use of his property, because there are many trades and many occupations which are not only reasonable but necessary to be followed, and which still cannot be allowed to be followed in the proximity of dwelling-houses so as to interfere with the comfort of their inhabitants. I suppose a blacksmith’s trade is as necessary as most trades in this kingdom; and I might take instances of many noisy and offensive trades, some of which are absolutely necessary, and some of which no doubt may not only be reasonably followed, but to which it is absolutely and indispensably necessary for the welfare of mankind that some houses and some pieces of land should be devoted; therefore, I think, that is not the test:” *Broder v. Sail-lard*, 2 Ch. Div. 692, per JESSEL, M. R.

6. *Noises ordinarily incident to certain situations.*—Those who live in cities, in hotels, or in tenement houses, cannot claim the aid of a court of equity to gain for themselves immunity from those noises which are customary and usual, and which are the ordinary incidents of the place in which such persons may choose to take up their abode. Thus, a man living in a tenement house was denied an injunction to prevent his neighbor, who lived on the floor immediately above him, from trundling a baby carriage back and forth over his carpet at night, in order to appease a child which was teething and fretful. Good neighborhood might, indeed, suggest that a noiseless cradle, or some other appliance should be used; but in such a case the law would not interfere. “As a matter of law,” the court said, “if the plaintiff himself was taken sick and obliged to walk the floor all night through pain, the defendant would have no right to insist that he should put on india rubbers. * * * Where people indulge their inclination to be gregarious they must not

expect the quiet that belongs to solitude :'' *Pool v. Higginson*, 8 Daly 113 ; s. c. 7 Cent. L. Jour. 102.

7. *Necessary noises in cities*.—In determining the question of nuisance from smoke or noxious vapor, or from noise or vibration, it has been well laid down that reference must always be had to the locality, the nature of the trade, the character of the machinery and the manner of using the property producing the annoyance and injury complained of. A party dwelling in the midst of a crowded commercial and manufacturing city cannot claim to have the same quiet and freedom from annoyance that he might rightfully claim if he were dwelling in the country. Every one taking up his abode in a city must expect to encounter the inconveniences and annoyances incident to such a community, and he must be taken to have consented to endure such annoyances to a certain extent :'' *Dittman v. Repp*, 50 Md. 516, 522. Or, as was said by Lord WESTBURY, L. C., in a leading case : "If a man lives in a town, of necessity he must submit himself to the consequences of the operations of trade which may be carried on in his immediate neighborhood, which are actually necessary for trade and commerce, also for the enjoyment of property and for the benefit of the inhabitants of the town. If a man live in a street where there are numerous shops, and a shop is opened next door to him which is carried on in a fair and reasonable way, he has no ground for complaint because to himself individually there may arise much discomfort from the trade carried on in that shop. And Lord CRANWORTH also said : "You must look at it, not with a view to the question whether abstractly that kind of smoke was a nuisance, but whether it was a nuisance to a person living in the town :'' *Tipping v. St. Helens Smelting Co.*, 4 B. & S. 608 ; s. c. 11 H. L. Cas. 642, 650.

8. *Useless noises in cities*.—On the other hand, the court have not dealt leniently with *useless* noises in cities or in public places. Thus, *outcries* uttered in a public street, although they disturb but a single person, if they are accompanied with the other circumstances necessary to constitute the offence, are indictable as a public nuisance : *Com. v. Oaks*, 113 Mass. 8 ; *Com. v. Smith*, 6 Cush. 80 ; *Com. v. Harris*, 101 Mass. 29. In like manner a *circus* has been enjoined as a nuisance, where the performances were carried on for eight weeks every evening, from about half-past seven until half-past ten, consisting of music and shouting, which could be distinctly heard all over plaintiff's house and in his dining

room, even above the sounds of conversation, when the windows were closed and several persons were talking: *Inchbald v. Robinson*, L. R., 4 Ch. App. 388. So the striking of a clock in the night time, upon a bell that weighed 3080 pounds, was enjoined upon the testimony of the two plaintiffs and four others, to the effect that it disturbed their rest, although more than a hundred witnesses living at various distances from it, many of them as near to it as the plaintiffs and the plaintiffs' witnesses, testified that it had no unpleasant effect upon them: *Leete v. Pilgrim Cong. Church*, St. Louis Court of Appeals 1883 (not reported).

9. *Noisy trades located in neighborhoods devoted to residences.*—In like manner the business of a gold or silver beater set up in a quiet neighborhood occupied by dwellings, the noise and concussion of which unreasonably interferes with the comfort of the inhabitants in their dwellings, and perhaps also with the safety of neighboring property, was held such a nuisance as equity would restrain. In giving his judgment in this case ALLISON, P. J., referred to a decision of the late Chief Justice THOMPSON of Pennsylvania granting an injunction against a tinsmith, at the suit of a householder disturbed by the noise of his business. He also said: "Everything that disturbs in an unreasonable degree the quiet enjoyment of a home or dwelling-house is a nuisance. A man is to be protected in the enjoyment of his property against all unlawful disturbances, if he does not, by such enjoyment, invade the rights of others. * * * The defendant has no right to complain if the injunction presses hard on him. He intruded his business into one of the most quiet neighborhoods in the city—a neighborhood rendered desirable as a home, in which quiet and rest could be found. This was wholly unnecessary on his part, many portions of the city being given up to business and its attendant noise and turmoil; other portions affording isolation in which business could be carried on causing discomfort to no one. While business is to be fostered and protected against unreasonable objection, the home of the citizen, under the law, has an equal right to be defended against the wanton intrusion that destroys or unreasonably impairs its enjoyment:" *Wallace v. Auer*, 10 Phila. 356.

10. *Noises proceeding from a business carried on at unreasonable hours.*—A lawful trade may be enjoined as a nuisance on the ground that it is carried on at unreasonable hours. Thus, where the defendant erected a tin-shop some eighty feet

from the back building and sleeping room of the complainant, and there carried on work, generally beginning in the morning before daylight, and resuming it again in the evening at or about 6 o'clock P.M., and keeping it up until 11 o'clock at night, having general employment elsewhere during the day; and the affidavits showed that the noises which proceeded therefrom were intolerable, so as almost to drown conversation in the plaintiff's house, and to compel them to abandon their chambers next to the shop, and to deprive them of their rest,—the court saw in the case no disputed question which required a trial at law, and had no difficulty in granting an injunction: *Dennis v. Eckhardt*, 3 Grant's Cas. 390.

11. *Doctrine that in order to constitute a nuisance the noise must be "unusual, ill-timed, or deafening."*—In a case in the Superior Court of New York it was said by SANDFORD, J.: "Noise is usually incident to the motion of machinery and to mechanical pursuits, especially those which are carried on through the agency of steam. But noises are not, *ex necessitate*, nuisances, even when disagreeable; and it is only when they are of a character so objectionable as fairly to come within the meaning of that significant term that a court of equity will interfere to repress or restrain them:" *Butterfield v. Klaber*, 52 How. Pr. 255, 262. In another case in the same state it was said: "Mere noise, perhaps, unless *unusual, ill-timed, or deafening*, may not be such a nuisance as to authorize the entertainment of an action therefor, even when it interferes with another person's avocation or pursuits;" and the decision, which was in favor of the plaintiff, proceeded on the ground that something more palpable than discomfort by noise was established by the evidence: *McKeon v. See*, 4 Rob. (N. Y.) 449. Where, upon the examination of the evidence, it appeared that the noises produced by machinery operated by steam in a marble-cutting establishment adjacent to a property owned by the plaintiff and occupied as residences, was not *unusual*,—that is, was such a noise as is ordinarily incident to the use of similar machinery; was not *ill-timed*,—that is, was produced only in the ordinary working hours of the day; and was not even *loud*, though it was audible from some of the residences near by,—the court refused an injunction on the ground of these noises: *Butterfield v. Klaber*, 52 How. Pr. 255, 263.

12. *Whether a right to perpetuate disagreeable noises may*

be acquired by user.—The carrying on of a trade which produced certain injurious noises for ten years was held not to be such a user as gave the defendant a prescriptive right to continue the same, though possibly a user of twenty years, if pleaded and proved, would have been a good defence: *Elliotson v. Feetham*, 2 Bing. (N. C.) 134. It is said by Lord ROMILLY: "It is true that by lapse of time if an owner of the adjoining tenement, which, in case of light or water is usually called the servient tenement, has not resisted for a period of twenty years, then the owner of the dominant tenement has acquired the right of discharging gases or fluid, or sending smoke or noise, from his tenement over the tenement of his neighbor; but until that time has elapsed, the owner of the adjoining or neighboring tenement, whether he has or has not previously occupied it,—in other words, whether he comes to the nuisance, or the nuisance comes to him—retains his right to have the air that passes over his land pure and unpolluted, and the soil or produce of it uninjured by the passage of gases, by the discharge of deleterious substances, or by the flow of water:" *Crump v. Lambert*, L. R., 3 Eq. 408. A late English case goes far against the doctrine that the right to perpetuate a nuisance can be acquired by user. The defendant, a confectioner in Wigmore street, London, had, for more than twenty years, used, without interruption, a pestle and mortar in a back shop, built on what had been the garden of his house. Subsequently, the plaintiff, who was a physician, built a consulting room in his garden, abutting on the defendant's back shop, and sought to restrain the use of the defendant's pestle and mortar, which had now become a nuisance, though formerly it had not been noticed. It was held that the defendant had not acquired by user a right to make the noise complained of, which was neither physically capable of being prevented, nor actionable by the servient owner. This principle was held applicable both to affirmative and negative easements: *Sturges v. Bridgman*, 11 Ch. Div. 852; s. c. 28 Weekly Rep. 200.

13. *The question said to be a question of degree.*—"A nuisance of this kind," said Lord SELBORNE, L. C., "is much more difficult to prove than when the injury complained of is the demonstrable effect of a visible and tangible cause, as when waters are fouled by sewage, or when the fumes of mineral acids pass from the chimneys of factories or other works, over the land or house, producing deleterious physical changes which science can

trace and explain. A nuisance by noise, supposing malice to be out of the question, is emphatically a question of degree. If any neighbor place a house against a party wall next to my own, and I hear through the wall more than is agreeable to me of the noise from his nursery or his reading-room, it does not follow, even if I am nervously sensitive or in infirm health, that I can bring an action or obtain an injunction. Such things, to offend against the law, must be done in a manner which, beyond fair controversy, ought to be regarded as exceptive and unreasonable:" *Gaunt v. Fynney*, L. R., 8 Ch. 8, 11.

14. *Effect of expectant attention.*—In estimating the value of evidence in these cases, as juries and courts of equity are called upon to do, science has offered valuable aid in explaining what is "expectant attention." This is shown to produce effects something like these: If, for any reason, or from any cause, the attention of a person is specially drawn to a sound, which under ordinary circumstances would not disturb him at all, it may thereafter become disturbing and a source of serious annoyance. This is perhaps well illustrated by a case before Lord SELBORNE, where it was sought to enjoin the noises and vibrations produced by the machinery in a silk factory. It appeared to the satisfaction of his lordship that the noises complained of had gone on for five years, just as they were going on at the time of the complaint, during all which time the plaintiffs, who were unmarried ladies, did not regard them as nuisances. It also appeared that, at the time when the noises began to be a source of annoyance to them, a sudden noise had alarmed their servants, since which time the plaintiffs had entertained an idea of some danger from the boilers used by defendant, and that from that time the noises of his machinery became a source of constant irritation and uneasiness to them—a fact which was obviously attributed by his lordship to the cause named. The noises now seemed to them to be very much louder and more disturbing than before, and they testified to this as a fact, though the undoubted evidence was to the contrary: *Gaunt v. Fynney*, L. R., 8 Ch. 8, 13. Lord SELBORNE quoted from a recent scientific work (Tuke on the Influence of the Mind on the Body), "that the thought uppermost in the mind, the predominant idea or expectation makes a real sensation from without assume a different character." There is little doubt that nervous persons, after commencing a legal action in respect of a nuisance, are con-

scious of being very seriously annoyed by it, when, under ordinary circumstances, they might not notice it.

15. *Effect of conflicting evidence as to whether sounds are disturbing.*—In cases in equity the court will frequently be called upon to discharge the painful responsibility of deciding, upon conflicting evidence, the question whether the sounds complained of are really disturbing. It has been pointed out that, in such cases, a useful principle for the government of the court is the rule which regards the testimony of a credible witness swearing positively to an affirmative fact, and which disregards that of another witness, equally credible and standing in a similar situation, who swears that he is not aware of the same fact. Applying this test, it has been said that, where the witnesses in a certain house say that they were pleasurably affected by sounds which the witnesses in other houses agree is a cause of pain, it will appear that such testimony is not necessarily conflicting, and that the court is not reduced to the disagreeable necessity of supposing that either statement is inaccurate. "The similarity which exists among mankind, while they are well, and authorizes us to infer that like causes will produce the same result, is replaced under the influence of ill health, by divergences, which not only render the sufferer unlike his fellows, but may, for the time being, seem to render him the denizen of some other world. The sensation of one patient may be dulled by his malady, while that of another becomes preternaturally acute and are tortured by that which brings pleasure and harmonious sensations to the first:" *Harrison v. St. Mark's Church*, 12 Phila. 259, opinion by HARE, P. J.¹

¹ In a late case in Virginia, the nuisance complained of was a slaughter-house, and the annoyance and discomfort which the complainant alleged, was hearing the groans and cries of the animals when being slaughtered, and more especially the offensive odors. Many witnesses were introduced by the defendants, whose testimony, as we infer, was to the effect that they were not incommoded by the slaughter-house in the manner in which the plaintiff claimed to have been incommoded. Concerning this testimony, the court said: "1. Many of the witnesses do not live in the immediate vicinity of the slaughter-house, and none of them, except perhaps one or two, is near the residence of Mrs. Pendleton (the plaintiff), and some of them only occasionally visited the slaughter-house. 2. The testimony, or the most of it, in relation to the grounds of the complaint, is negative in its character, and not necessarily inconsistent with the testimony on behalf of the appellee (the plaintiff). On the other hand, the witnesses for Mrs. Pendleton speak of many things that came positively under their direct observation—facts which constitute the nuisance charged, and they had the best opportunity to be informed and to know whereof they spoke." A decree restraining the nuisance was affirmed: *Pruner v. Pendleton*, 75 Va. 516.

16. *Stables*.—Livery stables are not nuisances *per se*, though they may manifestly be so conducted as to become such. A court of equity will not therefore enjoin the establishment of a livery stable, although in a neighborhood occupied by elegant residences in a city; since this would be exerting the extraordinary powers of such a court against the establishment of an occupation which might or might not become a nuisance, according to circumstances: *Flint v. Russell*, 5 Dill. 151. See also *Aldrich v. Howard*, 7 R. I. 87; s. c. 8 Id. 246; *Burditt v. Swenson*, 17 Tex. 489; *Dargan v. Waddill*, 9 Ired. Law 244; *Kirkman v. Handy*, 11 Humph. 406; *Coker v. Birge*, 10 Ga. 336; *Harrison v. Brooks*, 20 Id. 537; *Morris v. Brower*, 1 Anth. 368. But stables erected in the immediate proximity of dwelling-houses, so that the inmates of the same were disturbed and kept awake by the stamping of the horses, have been enjoined as nuisances: *Ball v. Ray*, L. R., 8 Ch. 467; *Broder v. Saillard*, 2 Ch. Div. 692. Thus, where the occupier of a house in a street in London had, many years ago, converted the ground floor into a stable, and, in 1871, a new occupier altered the stable, so that the noise of the horses was an annoyance to the next door neighbor and prevented him from letting his house as a lodging, it was held, in 1873, that the fact of horses having been previously kept in the stable, but not so as to be an annoyance, did not deprive the neighbor of his right to have the nuisance restrained: *Ball v. Ray*, L. R., 8 Ch. 467. In such a case, the following language was used by an eminent judge, Sir GEORGE JESSEL, M. R., in *Broder v. Saillard*, *supra*: "A man has a right to turn his dwelling-house into a stable, or his stable into a dwelling-house. That is not the question." The learned judge then quoted the language of Lord Justice MELLISH in a previous case, as follows: "When, in a street like Green street, the ground floor of a neighboring house is turned into a stable, we are not to consider the noise of horses from that stable like the noise of a piano forte from a neighbor's house, or the noise of a neighbor's children in their nursery, which are noises we must reasonably expect, and must, to a considerable extent, put up with. A noise of this kind that materially disturbs the comfort of the plaintiff's dwelling-house, and prevents people from sleeping at night, and, still more, that does really and seriously interfere with the plaintiff's trade as a lodging-house keeper, beyond all question constitutes an actionable nuisance:" *Ball v. Ray*, L. R., 8 Ch. 467, 471.

"The test," continued Sir GEORGE JESSEL, "therefore is, whether the stables are unluckily so situated that the noise from the horses, not being uncommon horses in any way, materially disturbs the comfort of the plaintiff's dwelling-house, and prevents the people from sleeping at night:" *Broder v. Saillard, supra*. And he accordingly concluded that, "if a stable is built as this stable is, not as stables usually are, at some distance from dwelling-houses, but next to the wall of the plaintiff's dwelling-house, in such a position that the noise would actually prevent the neighbors' sleeping, and would frighten them out of their sleep, or would prevent their ordinary and comfortable enjoyment of their dwellings, all I can say is that is not a proper place to keep horses in, although the horses may be ordinarily quiet:" *Id*.

17. *Factory bell rung early in the morning*.—A bell weighing 2128 pounds was placed by the owners of a factory upon their mill, and was rung every working day, once at five o'clock and twice between six and six and a half o'clock in the morning, and at other times during the day, except that the five o'clock bell was discontinued during the summer months. The plaintiffs resided respectively 1090 and 295 feet from the bell tower. Upon a bill brought by them, the ringing of this bell was restrained as a nuisance, although a large majority of persons living nearer to the bell than the plaintiffs were not annoyed by it, and although some persons may have had such associations with the sound that it may have been to them a pleasure rather than an annoyance; whilst the sensibilities of others to the sound may have become so deadened that it did not disturb them. As the ringing of the bell was not essential to the defendant's business, and was nothing more than a convenience, while it interfered with the rights of the plaintiffs, it was held that they were entitled to an injunction without having obtained a previous judgment at law: *Davis v. Sawyer*, 133 Mass. 289.

¹ In an old case of an information for erecting and continuing a soap boilery in Wood Street, in London, to the annoyance of the neighborhood, the trial was before JEFFREYS, C. J., at Guildhall—a judge whose name is more unsavory to posterity than any soap-boilery. The defendant was found guilty and the reporter has put down the following statement: "In this case was remembered the case of a calendar man here in London in Bread street, who was convicted before Lord HALE on such an information, for that the noise disturbed the neighborhood and shook the adjacent houses; and the case of *The King v. Jordan* for a brewhouse on Ludgate Hill, about a year and a half since; and he was forced to prostrate the same and direct it to another use; for that such trades ought not to be in the principal parts of the city, but in the outskirts: *The King v. Pierce*, 2 Shower 327.

18. *Church Bells*.—Where a church was built upon a side of a street at about the centre of one side of a block in a neighborhood compactly built up by residences, many of them four and five stories high, so that it stood in a sort of court with its belfry not more than sixty feet from the windows of some of the surrounding residences, in which belfry its bells were suspended at a height of sixty-seven feet from the ground, and nearly on a level with the roofs of the nearest houses, and the chime consisted of four large bells, which were rung at various times during the week and on Sundays, producing sounds which disturbed a large number of persons residing in the immediate neighborhood and which were, according to competent medical testimony, injurious to the sick and productive of disease, a provisional order was entered restraining the defendant from ringing the bells or otherwise using the same, so as to cause nuisance or annoyance, by sound or noise, to the complainants, or any of them, within their respective homes: *Harrison v. St. Marks Church*, 12 Phila. 259. This was affirmed in a modified form by the Supreme Court of Pennsylvania, three of the judges, MERCUR, PAXSON and STERRETT, dissenting, on the ground that it was not a proper case for a preliminary injunction. The restraining order, as entered in the Supreme Court, compelled the cessation of the ringing at seven o'clock in the morning and limited the ringing for the ordinary services to five minutes before each service.

A still earlier precedent is found for this relief. In 1851, Vice-Chancellor KINDERSLEY enjoined the ringing of a church bell under the following circumstances: A Catholic order called the Redemptorist Fathers took a lease of a house adjoining the plaintiff's, and on it caused a wooden frame to be erected in which a bell was hung which was rung five times on Monday, Tuesday, Wednesday, Thursday and Friday, six times on Saturday and oftener on Sunday, in every week. The ringing ordinarily commenced at five o'clock in the morning and continued for ten minutes, to the great discomfort and annoyance of the plaintiff and his family. Subsequently a Roman Catholic church was erected on the ground adjoining the chapel, with a steeple in which was placed a peal of six bells, which were rung at intervals during every day, commencing at five o'clock in the morning, and very frequently on Sunday. This peal of bells was suspended but sixty feet from the plaintiff's bedroom window. An injunction was granted "to restrain the defendant and all per-

sons acting under his direction or by his authority, from tolling or ringing the bells in the plaintiff's bill mentioned, or any of them, so as to occasion any nuisance, disturbance and annoyance to the plaintiff and his family residing in the dwelling-house in the bill mentioned :” *Soltan v. De Held*, 2 Sim. (N. S.) 133. The learned judge thought that it was possible that some of those bells might be rung so as not to occasion any nuisance or annoyance to the plaintiff, and therefore he did not think it right to say that none of the bells should be rung again. At that time the feeling against Roman Catholics in England was much stronger than at present. It was boldly urged in behalf of the plaintiff that Roman Catholics had no right to keep and ring bells in connection with their places of worship. The vice-chancellor carefully refrained from deciding this question; but he was equally careful to point out that this was not a “church” within the meaning of the English law, but that it was a Roman Catholic “chapel,” and that his decision would not accordingly affect the ringing of bells in any parish church established under that law. Another very important feature of this case was that the plaintiff had previously established the fact that this was a nuisance by a recovery of damages at law.

Going back to 1724 we find a case where the plaintiffs' house (they were husband and wife) being so near a parish church that the five o'clock bell greatly disturbed the wife, who was sickly, they purchased their peace by agreeing in writing with the churchwardens and inhabitants at a vestry, that they would erect a cupola and clock at the church, and that, in consideration thereof, the five o'clock bell should not be rung during their lives or that of the survivor of them. In pursuance of the agreement the plaintiffs erected a cupola, clock and bell, and the five o'clock bell remained silent for about two years, until “the defendant, an ale-house keeper, being chosen churchwarden, a new order of vestry was obtained for the ringing of the five o'clock bell.” Upon a bill filed to enjoin this ringing, it was held that this was a good contract, and the court enjoined the ringing of the five o'clock bell during the lives of the plaintiffs or the survivor of them, according to its terms. Among other things, the lords commissioners are reported to have said that the ringing of the five o'clock bell did not seem to be “of any use to the parish, though of very

ill consequence to the plaintiff, the Lady Howard:" *Martin v. Nutkin*, 2 P. Wms. 266.

19. *Railroad engines in the neighborhood of churches*.—It has been held and denied that an action on the case lies against a railroad company for nuisance in running their cars and engines, ringing bells, blowing off steam, and making other noises in the neighborhood of a church or meeting-house on the Sabbath, and during public worship, which so annoy and molest the congregation worshipping there, as greatly to depreciate the value of the house, and render the same unfit for a place of religious worship: *First Baptist Church v. Schenectady, &c., Railroad Co.*, 5 Barb. 79, where it was held that such an action would lie. *First Baptist Church v. Utica, &c., Railroad Co.*, 6 Barb. 313, where the contrary was held. The Supreme Court of Pennsylvania refused to enjoin the running of street railway cars on Sunday, on the ground that, if it were a nuisance at all, it was a *public* nuisance, to be redressed at a suit of the Commonwealth: *Sparhawk v. Union Passenger Railroad Co.*, 54 Pa. St. 401. It was also held that an action for such an injury is properly brought against the railroad company, in its corporate character, by the church in its corporate character: *First Baptist Church v. Schenectady, &c., Railroad Co.*, *supra*. See also *Balt. & P. Railroad Co. v. Fifth Baptist Church*, U. S. Sup. Ct., April 1883, 2 Sup. Ct. Rep. 719.

20. *Noises frightening horses*.—It is not every occasional and accidental noise which might frighten a horse in a stable on a particular day, that would entitle the plaintiff to an injunction, if the general case or habitual nuisance alleged in the bill were not satisfactorily proved: *Gaunt v. Fynney*, L. R., 8 Ch. 8, 14, per Lord SELBORNE, L. C. Accordingly, where the bill sought to enjoin the noise and vibration produced by machinery in a silk factory, witnesses for the plaintiff stated that, on one occasion, the horse of a visitor, when put in the adjoining stable, suffered tremors—"as to which his lordship said that this evidence did not make a powerful impression on his mind:" *Id*. The governing principle here was that effects which are only occasional or accidental, and which do not necessarily flow from the thing complained of, are not ground of injunction, although they may afford ground of an action at law: *Cooke v. Forbes*, L. R., 5 Eq. 166.

21. *Steam whistle*.—It is said that a steam whistle is not *per se* a nuisance; but those who make use of it are bound to use

it in such a place and in such a manner that it shall not become a nuisance: *Parker v. Union Woollen Works*, 42 Conn. 399; *Knight v. Goodyear & Co.*, 38 Conn. 438. "Such whistles are necessary upon railroad engines to frighten horses and cattle that may stray upon the road in front of the engine, and drive them from the track. They are also necessary to give notice of the approach of a train to persons about to cross the track, at such a distance that the bell cannot be heard. In this and other cases, their use upon railroads is important, valuable, and both sanctioned and required by law; and in such cases, the usefulness of the whistle depends upon the alarming and frightening character of the noise it makes; and one of the purposes for which it is used, is to frighten and alarm. This is well understood, and the owners of animals, which often become accustomed to whistles, are bound to submit to the necessities of the case, and, if they drive them where locomotive whistles are liable to be blown, they take the risk upon themselves, and, if any injury results, they can have no redress. But the rule should be and is different in respect to whistles used upon factories. Their use is not necessary at all, but, if used, there is no necessity for constructing them in such a way, and using them in such a manner as to alarm or frighten any person or animal. All the purposes to be attained from their use upon factories can be attained without constructing and using them in an alarming manner. It follows that an unnecessary alarming or frightening use of them, if productive of injury to another, is unlawful, and the proprietors should be holden responsible for the injury:" *Knight v. Goodyear & Co.*, 38 Conn. 438, 441. It was accordingly held that proprietors of factories are not entitled to use steam-whistles on their factories so located, of such a character, and used in such a manner, as to frighten horses of ordinary gentleness, when passing upon the highway adjoining their land; and that they are responsible for an injury caused by an unnecessary, alarming, or frightening use of them: *Id.*

22. *How far plaintiff under obligation to avoid consequences of such a nuisance—Contributory negligence.*—Every person is ordinarily bound to take reasonable precaution to guard against known dangers, and cannot make the negligence or fault of another a ground of recovering damages for injuries which he himself might have avoided by the exercise of ordinary care. But contributory negligence cannot be attributed to a person for driving

a well-broken and ordinarily gentle horse upon the highway, in the course of his business, in good faith, although in the vicinity of a factory where a steam whistle is kept and where it may be unnecessarily blown : *Knight v. Goodyear, &c., Co.*, 38 Conn. 438. But where the plaintiff's horse which, otherwise gentle, had the vicious habit of pulling when tied to a post, was fastened by a stout rope on the side of a public street near a factory which had a steam whistle upon it which was used for the purpose of calling its operatives, the sound of which was shrill and calculated to frighten ordinary horses; and while the plaintiff's horse was so tied, the whistle was blown, whereat the horse became frightened and pulled violently at the rope which broke and he was killed, it was held that the plaintiff could not recover damages, although it was found as a fact that if the whistle had not sounded, the horse would not have been killed, it having been also found that if the horse had been free from the habit of pulling he would not have been killed : *Parker v. Woollen Co.*, 42 Conn. 399.

23. *Injuries produced by vibration.*—Courts of equity have in a number of cases either interposed to restrain nuisances produced by machinery which results in the vibration of adjoining buildings or residences, or have otherwise recognised the principle that such nuisances may in proper cases be abated by an injunction. See Wood on Nuisances 553-568. Thus, in a late well-considered case, the complainant and defendant occupied adjoining buildings, the walls of which touched each other in places. The defendant carried on in his place of business a printing and book-binding establishment. He had there a twelve-horse power engine with boiler attached, and six printing presses, four operated by steam and two by hand. This machinery was so placed that its power was exerted in lines running east and west; in other words, across the building, and not longitudinally, so that the west wall of complainant's building was compelled to receive whatever shock was produced by this vibratory force. The defendant carried on in the adjoining building a saddlery manufactory. The evidence tended to show that the vibrations received from the plaintiff's building were so great at times as to render it impossible to do certain kinds of work in the defendant's building. One witness said that when the vibration was greatest, the floor seemed to creep under his feet and he could not write at all. The defendant's bookkeeper said that it prevented him at times from making marks with his pen that he ought to make. Several of the defendant's employees swore

that they were more or less disturbed by the vibration. It gave a headache to some or produced a dizzy sensation; in others it produced nausea closely resembling sea sickness. Others testified that when the motion was strongest they found it impossible to do such parts of their work as required a steady hand and clear eye, such as delicate stitching and exact cutting in curved or irregular lines. One swore that on several occasions he had been compelled, in consequence of the vibration, to take his work to his dwelling and do it there. Everything pendent about the building oscillated like the pendulum of a clock. The actual deflection of the walls, however, was not shown to be over one-eighth to three-sixteenths of an inch. The court found it difficult to believe that so much disturbance could be produced by so slight a deflection. The learned judge, however, said: "I am not at liberty to decide the case on a theory or deduction based on a single fact, but must find the fact according to the truth as established by the evidence as a whole. Unless complainants' witnesses, without exception, have exaggerated the effect of the vibration to such an extent as to render their stories downright falsehoods, it must be taken as an established fact in the case that the vibration very sensibly and materially interferes with the complainants in the prosecution of their business. My judgment is that the defendant is guilty of a nuisance which it is the duty of this court to redress. But this conclusion does not necessarily involve the destruction of the defendant's business. The injury to the complainants in my judgment is caused solely by the position of the machinery. As already stated it is now placed so that its whole force is expended across the defendant's building and directly against that occupied by the complainants. To me it seems very plain that if it is changed so that its force shall be expended longitudinally with the building, and not transversely, the injury the complainants now suffer will be remedied and all cause of complaint removed. This is the unanimous opinion of all the experts who have spoken on the subject. A decree will be advised directing the defendant to change the position of his machinery in accordance with the view above indicated, and that an injunction shall issue restraining him from operating any machinery in the building occupied by him to such an extent as shall produce a vibration in the complainants' building sufficient to annoy or disturb them in the conduct of their business: *Demarest v. Hardham*, 34 N. J. Eq. 469, 476-7.

24. *Vibration of steam-hammers in a rolling-mill.*—In an action at law for damages, caused by the cracking of certain cottage walls belonging to the plaintiff, by the vibration caused by steam-hammers in a rolling-mill operated by the defendant, BLACKBURN, J., in summing up to the jury, said: "The question is whether this is a case of nuisance: that is, an actionable wrong. If the defendant, in the course of using these hammers, produced, not merely a nominal, but such a sensible and real damage, as a sensible person occupying the cottage would find injurious, that is a nuisance; but that which is a sensible and real inconvenience to property situated in one place and occupied in one way, will be none to property situated in another place or occupied in another way. If you are of the opinion that the vibration caused by the hammers has shaken and cracked the walls of the cottages, you will probably consider that to be a substantial and real mischief. If, on the other hand, you think the damage was caused by the removal of the adjoining cottages, whether that was justifiable or not, you ought to find a verdict for the defendant on that point of the case. So, with regard to the cottages standing empty; if that was caused by the hammering, you will find a verdict for the plaintiff; if, by the want of repair, for the defendant. A further point has been raised by the plea that the grievances complained of were caused by the defendant in the reasonable and ordinary exercise of his trade in a reasonable and proper place. My opinion is, that in law is no answer to the action. I think that it cannot be a reasonable and ordinary exercise of a trade which has caused such an injury to the plaintiff as she complains of:" *Scott v. Firth*, 4 Fost. & Fin. 349.

25. *Action, by whom brought.*—Injuries which flow from noises are not permanent in their nature, and an action to redress them can only be brought by those who are *presently* injured by them. Such an action, accordingly, cannot be brought by the *reversioner*; it must be brought, if at all, by the tenant: *Munford v. Oxford, &c., Railroad Co.*, 1 Hurlst. & N. 34. The rule is otherwise where the injury is not to the use merely, but to the property itself,—as in the case of the obstruction of light: *Tucker v. Newman*, 11 Ad. & E. 40. See *Dobson v. Blackmore*, 9 Q. B. 991; *Shadwell v. Hutchinson*, M. & M. 350. The rule is familiar that several complainants may unite in the bill to enjoin a nuisance where the injury complained of is *common to all*—as in

case of a noise or stench, common to a neighborhood: *Davison v. Isham*, 9 N. J. Eq. (1 Stock.) 186; *Catlen v. Valentine*, 9 Paige 575. But where the injury is not common to all, as where it consists in part of vibration produced by machinery, which affects the buildings of some of the complainants, and not those of the rest of them, there is a misjoinder of parties: *Davison v. Isham*, *supra*.

SEYMOUR D. THOMPSON.

St. Louis, Mo.

RECENT AMERICAN DECISIONS.

Supreme Court of Iowa.

YAHN v. CITY OF OTTUMWA.

The rule that a witness not an expert cannot testify as to his opinion is not of universal application. Under certain circumstances such a witness may state his observation as to cause and effect.

Thus where the question was as to the discharge of water from a hose and its effect upon a team of horses, a witness may state not only that the water was discharged, but that in his opinion it was this that frightened the horses.

Where an obstruction in the street is in plain view of the driver of a vehicle, and he drives against it, he is guilty of contributory negligence, and it is no answer to this to say that his attention was taken up with looking above the ground to direct his team.

APPEAL from Wapello District Court.

This action was brought to recover damages for an injury received by the plaintiff by being thrown from a wagon in one of the streets of Ottumwa, the accident having been occasioned, as it is alleged, by reason of one of the wheels of the wagon coming in contact with a stone which the city authorities had negligently allowed to remain upon the street. The pleadings are in the usual form of actions of this character, and a trial to a jury resulted in a verdict and judgment for the plaintiff. Defendant appeals.

Wm. McNutt and *W. D. Tisdale*, for appellant.

W. H. C. Jacques, *S. E. Alder* and *Stiles & Beaman*, for appellee.

The opinion of the court was delivered by

ROTHROCK, J.—1. The plaintiff and her husband, who is a farmer, reside in the vicinity of Ottumwa. On the morning of the day the injury was received they went to Ottumwa, in an ordinary